

1989

Paul R. Lochhead and Penny Lochhead v.  
Geraldine Baker Nelson : Petition for Writ of  
Certiorari

Utah Supreme Court

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Cooke & Wilde, P.C.; Robert H. Wilde; Attorney for Respondent.

Steven F. Alder; Attorney for Appellant.

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UTAH SUPREME COURT  
BRIEF

IN THE SUPREME COURT

STATE OF UTAH

PAUL R. LOCHHEAD and  
PENNY LOCHHEAD,

Plaintiffs/Respondents.

vs.

GERALDINE BAKER NELSON,

Defendant/Appellant.

PETITION FOR WRIT OF  
CERTIORARI

890191

PETITION FOR WRIT OF CERTIORARI  
OF THE UTAH COURT OF APPEALS CASE NO. 880508-CA

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**FILED**  
MAY 12 1989

## STATE OF UTAH

Defendant/Appellant.

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PETITION FOR WRIT OF  
CERTIORARI

PETITION FOR WRIT OF CERTIORARI  
OF THE UTAH COURT OF APPEALS CASE NO. 880508-CA

Attorney for Appellant

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### QUESTIONS PRESENTED FOR REVIEW

The following question is presented for review:

Is it the intent of the language of the Uniform Real Estate Contract to award a prevailing party reasonable attorney's fees necessary to defend an action brought upon the contract terms, where the defense enforces the contract and is based on proof of no default?

### COURT OF APPEALS OPINION

The decision of the Court of Appeals was made upon its own motion pursuant to the provisions for expedited proceedings under Rule 31. Accordingly, no written decision was provided. The decision of the trial court was affirmed.

### JURISDICTION

The appellants seek a grant of a Writ of Certiorari under the provision of Section 78-2-2 Utah Code Annotated which provides for review of the decisions of the Utah Court of Appeals and under the provisions of Rules 45 and 46 of the Utah Rules of Appellate Procedure.

### CONTROLLING STATUTES

The grant of certiorari is sought and governed by Rules 45 and 46 of the Utah Rules of Appellate Procedure. The underlying dispute is a question of contract law and does not require interpretation of any Utah Statutes.

### STATEMENT OF THE CASE

Appellant Nelson was the prevailing party in a law suit brought by the respondents claiming breach of contract. The breach of contract related to a claim that specific written warranties against water problems in the Uniform Real Estate Contract had been made and had been breached. The jury determined that the contract had not been breached by Nelson. The appellant sought attorney's fees for defending the suit. The trial court denied the request for attorney's fees on the grounds that the contract language precluded such an award where there was not a finding of default. The court specifically found that the contract language would only allow an award of attorney's fees to the prevailing party in the event of default and that in this case the prevailing party had prevailed by proving that there was no default and therefore the contractual language did not apply.

### ARGUMENT

The appellant argues that a broader meaning should be given to the attorney's fees provision of the Uniform Real Estate Contract. The broader interpretation should provide for recovery of attorney's fees for successful defending against a claim of default where the successful party seeks to enforce the contract. This interpretation is more consistent with the entire language of the paragraph and gives full meaning to the words "prevailing party" and furthermore upholds the implicit understanding of the

parties. Such decision is believed by the appellant to be consistent with prior case law and promotes sound public policy.

The Supreme Court should grant this petition for a Writ of Certiorari for the following reasons:

1. The case involves an important issue of public policy. The many contracts within the State of Utah are written with this or similar contracts which are prepared by the Department of Business Regulation for the use of the public. Ambiguities in the application of such language should be resolved by the Supreme Court for the benefit of the public. The current U.R.E.C. language and current statutes do not resolve the inherent question of interpretation.

2. This ruling of the Court of Appeals is contrary to the ruling in Swain v. Salt Lake Real Estate Investment Co., 3 Utah 2d 121, 279 P.2d 709 (1955) which petitioner argues is controlling in this case. The Supreme Court should resolve the conflicting statements of law as contained in Swain, supra, and Faulkner v. Farnsworth, 714 P.2d 1149, 1150 (Utah 1986). In Swain, supra, there was no default, the prevailing party enforced a similar contract and attorney's fees were awarded. In Faulkner, supra, a later case involving different language the court denied attorney's fees and in dicta appears to require a default for attorney's fees.

3. The Supreme Court in the decision of Quealy v. Anderson, 27 Utah Adv. Rep 24 (Utah 1988) has indicated a divergence of opinion between Chief Justice Hall, Justice




Zimmerman and the other Justices of this court pertaining to the right of a prevailing party to recover attorney's fees under such circumstances. This case provides an opportunity for the court to partially resolve differences of opinion and to give guidance to the attorneys and public practicing in the State of Utah. The grant of a Writ of Certiorari would allow the court to examine the issue of attorney's fees under similar but less difficult circumstances than those presented in Quealy, supra.

The petitioner believes that the decision of the Court of Appeals was in error and relies on the brief filed with the Court of Appeals which is attached hereto as an Addendum, in support of the position of petitioners relative to the underlying question of law, as to the interpretation of the contractual language under the circumstances of the case.

#### CONCLUSION

Certiorari should be granted in order to clarify the law relative to the right to recover attorney's fees by the prevailing party under the Uniform Real Estate Contract in instances where prevailing defends by proving they are not in default.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of May, 1989.

  
Steven F. Alder  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was deposited in the United States mail on the \_\_\_\_\_ day of \_\_\_\_\_, 1989, postage prepaid addressed to the following:

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Attorney at Law  
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---

## ADDENDUM

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IN THE UTAH COURT OF APPEALS

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PAUL R. LOCHHEAD and	:	
PENNY LOCHHEAD,	:	
	:	
Plaintiffs/Respondents.	:	Case No. 880508-CA
	:	
vs.	:	
	:	
GERALDINE BAKER NELSON,	:	
	:	
Defendant/Appellant.	:	

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BRIEF OF APPELLANT

---

ON APPEAL FROM THE THIRD DISTRICT COURT

Honorable Kenneth Rigtrup, District Court Judge, presiding

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Attorney for Respondents  
Paul R. Lochhead and  
Penny Lochhead

Attorney for Appellant  
Geraldine Baker Nelson

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### JURISDICTIONAL STATEMENT

Jurisdiction of this appeal in the Utah Court of Appeals is by virtue of the authority of the Utah Supreme Court to transfer cases to the Court of Appeals for disposition. Appeal to the Utah Supreme Court was originally predicated on appellant's rights under Section 3 Article 8 of the Utah Constitution and Utah Code Annotated §78-2-3(2)(j).

### NATURE OF THE PROCEEDINGS

Respondent Lochheads sued appellant Geraldine Nelson claiming breach of contract, breach of warranty, and misrepresentation amounting to fraud and seeking actual and punitive damages. These claims were based on finding leaks in the basement floor of the residence purchased by Lochheads from Mrs. Nelson on a Uniform Real Estate Contract.

The appellant, Nelson, counterclaimed for breach of contract alleging nonpayment of taxes and seeking attorney's fees for breach and for defending the Lochheads' claims.

At the conclusion of Lochheads case, the court granted Nelson's motion to dismiss claims of misrepresentation and fraud and claims for punitive damages. The jury denied Lochheads' claim of breach of contract and breach of warranty. Pursuant to stipulation of the parties Nelson's counterclaim for nonpayment of taxes was submitted to the court. The court granted Nelson judgment on her counterclaim in the amount of \$739.56.

The issue of Nelson's claim for attorney's fees was reserved for a hearing after the trial. The court denied Nelson's claim

for attorney's fees incurred in the defense of the Lochheads' suit for breach of contract and only awarded fees incurred in the prosecution of the counterclaim for unpaid taxes. Nelson appeals from this order.

#### STATEMENT OF THE ISSUES

Does the language of the Uniform Real Estate Contract preclude the recovery of attorney's fees incurred in defending an action brought for breach of contract, if the defending party prevails by demonstrating that no breach occurred.

#### STATEMENT OF THE CASE (FACTS)

Lochheads entered into a Uniform Real Estate Contract (UREC) to buy Nelson's house on about October 31, 1983. After the closing, the Nelsons agreed to continue to live in the home paying rent to the Lochheads until the Lochheads sold their home or until August 31, 1984. (See Uniform Real Estate Contract, Addendum 1.)

Prior to the sale to the Lochheads, the Lochheads visited the home on several occasions. During these visits and prior to October 31, 1983, Lochheads inquired about a water puddle in the backyard. The Nelsons discussed this puddle and also told the Lochheads about past water problems caused by runoff water coming into the basement through the windows.

The appellant Nelson testified that she never had any water percolate into the basement through the floor while she lived in the home. She also testified that she had disclosed to the Lochheads all water problems and that all past problems had been



corrected at the time of the sale. (Transcript has not been requested; the jury finding is not contested.)

The final contract contained the following express provision and warranty:

"(1) That there are no leaks now existing in the basement due to surface or drainage waters." Addendum 1

In May 1984 the Lochheads took occupancy of the home. In December and January of the following winter they claimed to experience water percolating into the basement in the middle of the bedroom floor. This action was commenced by the Lochheads shortly thereafter.

The jury denied the Lochheads claims for breach of contract and answered specific interrogatories finding that Mrs. Nelson had not breached the contract or warranty. See Special Interrogatories, Addendum 2.

Mrs. Nelson had counterclaimed for the 1984 property taxes because she had paid them and believed that it was the Lochheads responsibility to pay taxes after the contract was entered into on October 31, 1983.

The court ruled in favor of Mrs. Nelson awarding her \$739.56 for taxes paid. In a separate proceeding the court also awarded \$480.00 attorney's fees for prosecuting the counterclaim.

#### SUMMARY OF THE ARGUMENT

The appellant argues that a broader meaning should be given to the attorney's fees provision of the Uniform Real Estate Contract. The broader interpretation should provide for recovery

of attorney's fees for successfully defending against a claim of default and enforcing the contract.

This interpretation is more consistent with the entire language of the paragraph and gives meaning to the words "prevailing party" and the implicit understanding of the parties. Such a decision is consistent with prior case law and promotes sound public policy.

## ARGUMENT

### I.

IT IS THE INTENT OF THE LANGUAGE OF THE UNIFORM REAL ESTATE  
CONTRACT TO AWARD THE PREVAILING PARTY REASONABLE  
ATTORNEY'S FEES NECESSARY TO ENFORCE OR DEFEND AN  
ACTION BASED ON THE CONTRACT TERMS

The Uniform Real Estate Contract at issue in this case  
provides under paragraph 14 as follows:

"14. Attorney's Fees. Both parties agree that, should either party default in any of the covenants or agreements herein contained, the prevailing party in litigation shall be entitled to all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing or terminating this contract, or in obtaining possession of the Property, or in pursuing any remedy provided hereunder or by applicable law."

This contract was approved by the Utah Real Estate Commission for use by real estate agents and brokers. This particular contract was filled-in at the direction of the parties' realtors by the title company. The specific language quoted above was not drafted by the parties or by their attorneys.

The Utah Supreme Court has held that similar language provides for recovery of attorney's fees for successfully defending a claim of default. In Swain v. Salt Lake Real Estate and Investment Co., 3 Utah 2d 121, 279 P.2d 709 (1955) the court interpreted similar language.

In the Swain case the UREC language was as follows:

"[4] "The Buyer and Seller each agree that should they default in any of the covenants and agreements contained herein, to pay all costs and expenses that may arise from enforcing this agreement either by suit

or otherwise, including a reasonable attorney's fee."  
supra at 711.

In Swain the plaintiff sought to forfeit the defendant's interest in land being purchased on contract. The defendant prevailed by showing that the plaintiff had accepted payments and waived its right to forfeiture. The trial court denied both parties attorney's fees. The Supreme Court reversed holding that the defendant was entitled to his costs and stipulated amount of attorney's fees incurred defending the claims and "enforcing the agreement", although to do so he had to prove he was not in default.

After Swain the UREC attorney's fee provision was modified. In Faulkner v. Farnsworth, 714 P.2d 1149 (Utah 1986) the plaintiff had brought suit for specific performance. The defendant prevailed enforcing his understanding of the contract terms. The court found that the contract restricted recovery of attorney's fees to payment by the "defaulting party." The contract provided:

"The buyer and seller each agree that should they default in any of the covenants or agreements contained herein, that [sic] the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement." supra at 1150. (Emphasis added.)

The court specifically found that "the contractual language does not award attorney's fees to the prevailing party who succeeds in enforcing the agreement, but against the defaulting party whose default necessitates enforcement." Faulkner at 1151 (Emphasis added.)

At the time of the Faulkner decision, the language of the UREC had again been modified by the Real Estate Division to the form used by the parties in this case. The principle modification was to replace "defaulting party" with "prevailing party". The additional words "prevailing party" can only have additional meaning if the prevailing party need not prove a default to prevail, but instead may be vindicated in a claim of no default and enforce the contract.

The addition of this language indicates an intent by the drafters to allow recovery of attorney's fees under such circumstances.

In reaching this conclusion, the appellant is not asking the court to ignore the other language of the provision. The language, "in the event either party shall default," should be read in conjunction with the rest of the provision and be given the broader meaning understood by the parties. By doing this the court is also giving meaning to the language "prevailing party" and "enforce" also found in the provision.

This broader meaning implicitly includes prevailing against claims of default. The initiation of the court action claiming default and seeking damages against Nelson is certainly within the common understanding of the words "event of default". Had the plaintiffs prevailed the effect would have been to reduce the contract obligation by the amount of the damages awarded. This is not qualitatively different from withholding payment (which

may have occurred had there not been a large balance owing). Withholding payment is clearly an event of default.

Similarly, as in Swain, the initiation of suit seeking forfeiture is equivalent in effect to refusing to deliver title, a direct act of default.

The court should find that the language was broadly intended to include initiating legal action or making other claims which seek to alter the material expectation of the parties. Such actions are equivalent to an event of default for purposes of imposing the obligation to pay attorney's fees. Such broad interpretation is consistent with the purpose of attorney's fee provisions as explained in Management Services, Corp. v. Development Associates, 617 P.2d 406 (Utah 1980) and the common understanding of the usual parties to such agreements.

This interpretation also most directly corrects the imbalance that otherwise exists when one party claims default but is proven wrong. The prevailing party should not be penalized (by being dragged into court and incurring fees and expenses in defending a frivolous claim), but should receive her contractual expectations from "enforcing" the contract including recovering attorney's fees incurred in doing so.

Almost identical language has been interpreted in Brewer v. Tehuacana Venture, Ltd., 737 S.W.2d 349 (Tex.App. 1987). In that case a limited partner sued the Limited Partnership and general partners for an accounting and damages. Attorney's fees were governed by the following language.

"In the event either party hereto shall default upon his covenants and agreements herein, then the prevailing party hereto shall be entitled to reasonable attorney's fees for the enforcement of same." supra at 353.

As in this case the jury found no failure to disclose and no willful breach of contract, thus, there was "no default". Nevertheless, the court awarded the defendant attorney's fees as the prevailing party. The appellant court affirmed.

After the Utah Real Estate Commission removed the restriction that attorney's fees only be charged to the defaulting party as interpreted in Faulkner, the UREC more closely resembled the form interpreted by the Court in Swain, supra. As was done in Swain, the court should reverse the trial court and recognize the broad intent of the contract to allow the prevailing party to recover the costs of enforcing her expectations under the contract.

## II.

### FORM CONTRACTS ADOPTED BY PUBLIC ENTITIES FOR NON-ATTORNEYS REQUIRE FAIR AND EQUAL PROTECTION OF THE PARTIES RELYING ON THEIR LANGUAGE PROVIDED

The purpose of an attorney's fees provision was explained by the Utah Supreme Court in Management Services, Corp., supra quoting Zambruk v. Perlmutter Third General Builders, Inc., 510 P.2d 472 (Colo.App. 1973) that:

"The purpose of a provision for attorney's fees is to indemnify the creditor or the prevailing party against the necessity of paying an attorney's fee and to enable him to recover the full amount of the obligation." supra at 409.

In this case the prevailing party is not indemnified, but has been put to the cost of an expensive suit although her expectation under the contract has been vindicated by the jury's finding. She has not recovered "the full amount of the obligation".

The unfairness of this position was noted recently in the concurring opinion of J. Zimmerman in Quealy v. Anderson, 27 Utah Adv. Rep 24 (Utah 1988). The court found the recovery of attorney's fees to be barred by an accord and satisfaction. However, J. Zimmerman in his concurring opinion notes:

"If one party attempts to enforce the agreement, but the other party successfully defends by showing that the contract no longer is in force because of an accord and satisfaction or a rescision, the defendant cannot recover his attorney fees. Yet if the plaintiff is successful in his suit, he can recover his fees. This gives the plaintiff a monetary advantage in bargaining and in any suit.

Although the record is silent on the matter, there is no reason to believe that if the parties to the contract before us had considered the issue, they would have written it to produce the result reached by the Court. Similarly, I suspect that laymen who routinely enter into these standard form contracts with no legal advice assume that the attorney fee provision means that if any litigation arises out of the contract, the prevailing party will be awarded his attorney fees. This would not be an unreasonable assumption to one unfamiliar with the intricacies of the law. Yet I recognize that absent some other evidence of intent, the language of the contract, when read in light of the abstruse doctrines of accord and satisfaction or rescision, does require the result reached by the majority. And I can see no way for this Court to remedy the problem without doing undue violence to the legal doctrines involved." supra at 27.

Chief Justice Hall in his dissent goes further:

"The provision for attorney fees is contained in a preprinted document denominated as a "Uniform Real



Estate Contract" which is in general use in this jurisdiction. Plaintiffs argue the provision creates a right to attorney fees only for enforcing the contract or a right arising from breach of the contract against the defaulting party. Thus, under plaintiffs' interpretation, defendants would be entitled to attorney fees only if they brought an action against the plaintiffs in the event of plaintiffs' default. Relying on our recent decision in White v. Fox,<sup>10</sup> plaintiffs assert that defendants, not having bargained for an express contractual right to attorney fees incurred in defending a lawsuit on the contract, have no legal basis for claiming such fees.

Plaintiffs' construction of the attorney fees provision is unreasonably narrow and contrary to the intent behind the provision. Unlike the provision at issue in White, the provision in this case, even under plaintiffs' interpretation, applies to both parties to the contract. In White, we held that where the parties had equal bargaining power an agreement by one party to pay attorney fees could not be read to impose a reciprocal duty on the other party.<sup>11</sup> In this case, by the terms of the provision itself, the duty to pay attorney fees is reciprocal, and the issue is whether the duty includes liability for fees incurred by either party in successfully defending an action on the contract. I think it does. In successfully asserting that their contractual duty to buy the property had been excused, defendants in effect enforced their contractual rights. Thus, payment of their attorney fees by plaintiffs was required by the contract provision.

Moreover, the intent behind an attorney fees provision is to protect the party in whose favor the provision runs (in this case both parties) from the costs of litigation in the event such protection is warranted, i.e., in the event that the party prevails. This intent is fostered by requiring payment of attorney fees, regardless of which party initiated the lawsuit. To limit the award of attorney fees to the party commencing the action in no way advances the purpose of an attorney fees provision. Rather, it serves the counterproductive end of penalizing one who is the target of an unsuccessful lawsuit on the contract. Thus, the more reasonable interpretation of the contract provision is that which provides for an award of attorney fees to the prevailing party in litigation on the contract, regardless of whether that party initiated the lawsuit." supra at White v. Fox, 665 P.2d 1297 (Utah 1983).

This case is much easier than Quealy and the reasoning cited above more directly applicable. This is not a case where recovery is based upon theories outside the contract as in Quealy. Here the essence of the contract was in dispute.

This contract was not drafted by either party but by a state agency for use by the public. The provision of public policy expressed in Management Services, and Quealy should particularly apply. Thus, the provisions should be even-handed, should not create an unfair advantage and should, to the degree possible, protect the expectation of recovering the full amount of the obligation by the prevailing party.

#### CONCLUSION

The intent of changing "defaulting party" to "prevailing party" was to equalize the protection of both parties and to give full protection to the parties' expectations. To interpret the contract as done by the trial court is to frustrate this intent and to create a contract contrary to public policy. The court should reverse the trial court and remand for a determination of the reasonable attorney's fees necessary to defend this action and prosecute this appeal or award such fees as appear proper based on the record.

RESPECTIVELY submitted this \_\_\_\_ day of November, 1988.

---

Steven F. Alder  
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING DELIVERY

I hereby certify that four (4) true and correct copies of the foregoing BRIEF OF APPELLANT was mailed this 17<sup>th</sup> day of November, 1988 to:

Robert H. Wilde, Esq.  
Cooke & Wilde  
6925 Union Park Center  
Suite 490  
Midvale, Utah 84047

NELSON8.DOC

*Dy Anne M. Felton*

WHEN RECORDED MAIL TO:  
ASSOCIATED TITLE COMPANY  
833 East 400 South  
Salt Lake City, Utah 84102

3863885

SPACE ABOVE THIS LINE FOR RECORDING

## UNIFORM REAL ESTATE CONTRACT

### CAUTION: READ BEFORE YOU SIGN

- (1) This is a legally binding contract; if you do not understand it, seek legal advice before you sign.
- (2) This contract is intended to be filled in by lawyers or real estate brokers. All others seek professional advice.
- (3) To assure protection of certain priority rights in the Property, recordation of this contract and any assignments, addenda, or legally sufficient notices of interest is highly recommended.

1. Parties. This contract, made and entered into this 31st day of October, 1983, is by and between GERALDINE BAKER aka GERALDINE BAKER NELSON  
(hereafter collectively called "Seller"), whose address is  
and PAUL R. LOCHHEAD and PENNY LOCHHEAD, husband and wife, as joint tenants  
(hereafter collectively called "Buyer"), whose address is \_\_\_\_\_

2. Property. Seller agrees to sell and Buyer agrees to buy the real property (the "Property") located at 595 East 5900  
South (street address), in the City of Murray, County of Salt Lake  
State of Utah, described as:

All of Lot 49, EREKSON DAIRY SUBDIVISION, according to the official plat thereof on file and of record in the Salt Lake County Recorder's Office.

Together with all personal property as described in that certain Listing Card #12574 plus all fireplace screens and accessories

3. Date of Possession. Seller agrees to deliver possession and Buyer agrees to enter into possession of the Property on the ----- day of ----- 1984 no later than August 31, 1984.

4. Price and Payment. Buyer agrees to pay for the Property the purchase price of ONE HUNDRED FIFTY TWO THOUSAND AND NO/100 -----Dollars (\$ 152,000 ) payable at Seller's address above given, or to Seller's order, on the following terms: TWENTY FOUR THOUSAND FIVE HUNDRED SIXTY AND NO/100 Dollars (\$ 24,560.00 ) down payment, receipt of which is hereby acknowledged, and the balance of ONE HUNDRED TWENTY SEVEN FOUR HUNDRED FORTY DOLLARS AND NO/100 -----Dollars (\$ 127,440 ) being paid as follows:

The sum of \$1,240.15 shall be paid to Seller 30 days after Buyer takes possession of the subject property, and the sum of \$1,240.15 shall be paid to Seller on before the same day of each succeeding month thereafter, until the total unpaid principal balance together with interest accrued thereon at the rate of Eleven Percent (11%) per annum is paid in full.

It is understood and agreed that Buyer shall take possession of the subject property no later than August 31, 1984 and the monthly payments to the Seller shall commence no later than October 1, 1984.

It is understood and agreed that Buyer may make additional balloon payments for reduction of the principal balance. Any such payments greater than \$4,500.00 will reflect in a recast of payments based on the reduced principal balance as an incentive for paying off the contract early.

Payments shall include interest at the rate of Eleven percent (11%) per annum on the unpaid balance from the date of possession. Any payment not made within fifteen (15) days of its due date shall subject Buyer to a late payment charge of Five percent (5%) of such overdue payment, which charge must be paid before receiving credit for the late payment. The foregoing payments ☐ include ☒ do not include a reserve for payment of fire insurance premiums. Initially the reserve amount per payment is \$ n/a. In the event reserve payments in underlying obligations for taxes and/or insurance premiums for the Property change, Seller shall give Buyer thirty (30) days written notice of change, and reserve payments herein shall be adjusted accordingly.

All payments made by Buyer shall be applied first to payment of late charges, next to Seller's payments under Section 12 with interest as provided therein, next to the payment of reserves if any, next to the payment of interest, and then to the reduction of principal. Buyer may, at Buyer's option, pay amounts in excess of the periodic payments herein provided, and such excess shall be applied to unpaid principal unless Buyer elects in writing at the time of such payment that it shall be applied as prepayment of future installments.

From and after the time that the unpaid principal balance is equal to or less than the total balance outstanding on the underlying obligations referred to in Section 7 below, all payments received shall be distributed by Seller in a manner which will retire such underlying obligations either on or before the date of final payment under this contract. In the event of any prepayment, Buyer shall assume and pay all penalties incurred by Seller in making accelerated payments on any underlying obligations.

5. No Waiver. If Seller accepts payments from Buyer on this contract in an amount less than or at a time later than herein provided, such acceptance will not constitute a modification of this contract or a waiver of Seller's rights to full and timely future performance by Buyer.

6. Evidence of Title. Seller has, at his expense, furnished Buyer evidence of title in the form of ☐ an up-to-date abstract of title together with a current attorney's opinion ☒ an owner's title insurance policy insuring Buyer's interest in the Property under this contract for the amount of the purchase price.

7. Underlying Obligations. Seller warrants that the only underlying obligations against the Property are

(a) obligation in favor of First Interstate Bank with an unpaid principal balance of THIRTY SIX THOUSAND SIX HUNDRED ONE AND 89/100 Dollars (\$36,601.89) as of Oct 1 1983 with monthly payments of \$ 445.00 with interest at Nine & One Hal percent (9.5%) per annum and balloon payments as follows.

(b) obligation in favor of B. H. McEWEN and VIOLA McEWEN with an unpaid principal balance of FORTY TWO FOUR HUNDRED AND NO/100 Dollars (\$ 42,400.00) as of October 31 1983 with monthly payments of \$ 295.47 with interest at seven percent (7%) per annum and balloon payments as follows. Due in full when sellers equity is paid in full.

Copies of such underlying obligations have been delivered to and reviewed by Buyer. Such underlying obligations ☒ contain ☐ do not contain "due on sale" or "due on encumbrance" provisions. In the event that the Holder or Mortgagee of any underlying obligations is entitled to a remedy pursuant to a due on sale, non-alienation, or non-assumption provision as a result of the execution of this contract and/or any document(s) related hereto, the entire unpaid balance owed hereunder, without further notice, shall become immediately due and payable thirty (30) days following written notice to Buyer of the intent of any Holder or Mortgagee to exercise any such remedy.

8. Covenant Against Liens. ~~Except for the liens and encumbrances listed in the preceding Section, Seller covenants to keep the Property free and clear of all liens and encumbrances resulting from acts of Seller.~~ So long as Buyer is current hereunder, Seller agrees to keep current the payments on all obligations to which Buyer's interest is subordinate. Should Seller default on the foregoing covenants on any one or more occasions, Buyer may, at Buyer's option, in whole or in part, make good Seller's default to Seller's obligee and deduct all expenditures so paid from future payments to Seller and Seller shall credit all Buyer's sums so expended to the indebtedness herein created just as if payment had been made directly to Seller under the provisions of Section 4 above.

9. Risk of Loss, Prorations. All risk of loss, destruction of the Property, and expenses of insurance shall be borne by Seller until the agreed date of possession, at which time property taxes, assessments, rents, insurance, and other expenses of the Property shall be prorated.

10. Taxes and Assessments. Buyer agrees to pay all taxes and assessments of every kind which become due on the Property during the life of this contract. Seller covenants that there are no taxes, assessments, or liens against the Property not mentioned elsewhere herein except taxes which are accruing for the year 1983 and monthly assessments charged by Murray City which will be paid by Seller during which time Sellers has possession of the subject property.

11. Insurance. On and after the ~~agreed date of possession~~ closing date, Buyer shall maintain at Buyer's expense, the following insurance policies naming the Seller as an additional insured: (i) insurance against loss by fire and other risks customarily covered by "All Risk" insurance on insurable buildings and improvements at replacement value of 80% as a "Replacement Clause" endorsement shall designate, and (ii) general liability insurance having coverage of not less than the greater of \$100,000 or \$ 127,440 combined single limit with a certificate of insurance provided to Seller that includes a ten (10) day notice of cancellation in favor of Seller. All such insurance policies shall be in companies which are duly licensed by the State of Utah and are acceptable to Seller. Acceptance of such companies by Seller may not be unreasonably withheld.

12. Seller's Option to Discharge Obligations. In the event Buyer shall default in the payment of any taxes, assessments, insurance premiums or other expenses of the Property, Seller may, at Seller's option, pay said taxes, assessments, insurance premiums or other expenses, and if Seller elects so to do, Buyer agrees to repay Seller upon demand all such sums so advanced and paid by Seller together with interest thereon from date of payment of said sums at the rate of the greater of one and one-half percent (1½%) or 1.5 percent (1.5%) per month until paid, and when the principal sum provided in this contract is paid, if Buyer fails to also repay Seller such advances, Seller may refuse to convey title to the Property until such repayment is made.

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13 No Waste Buyer agrees that Buyer will neither commit nor suffer to be committed any waste, spoil, or destruction in or upon the Property which would impair Seller's security and that Buyer will maintain the Property in good condition

14 Attorney's Fees. Both parties agree that should either party default in any of the covenants or agreements herein contained the prevailing party in litigation shall be entitled to all costs and expenses including a reasonable attorney's fee which may arise or accrue from enforcing or terminating this contract, or in obtaining possession of the Property, or in pursuing any remedy provided hereunder or by applicable law

15 Binding Effect. This contract is binding on the heirs, executors, administrators, personal representatives, successors and assigns of the respective parties hereto

16 Buyer's Default. Should Buyer fail to comply with any of the terms hereof, Seller shall give Buyer written notice specifically setting forth the provisions under which Buyer is in default. Should Buyer fail to cure such default within Ten (10) days but not less than ten (10) days after said notice, Seller may, in addition to any other remedies afforded Seller by law, elect any of the following remedies:

A Seller may be released from all obligations in law and equity to convey the Property, and Buyer shall become at once a tenant at will of Seller. All payments which have been made by Buyer theretofore under this contract shall be retained by Seller as liquidated and agreed damages for breach of the contract, provided, however, that should payments of principal exceed twenty percent (20%) of the purchase price plus Seller's accrued interest, unreimbursed expenses under Section 10 and Section 12, fair rental value, and a reasonable attorney's fee, then and in that event, such excess shall be refunded to Buyer. This remedy shall not be available to Seller from and after the time Buyer shall have paid to Seller thirty-three and one-third percent (33 1/3%) or more of the purchase price; or

B Seller may bring suit and recover judgment for all delinquent installments and all reasonable costs and attorneys' fees, and the use of this remedy on one or more occasions shall not prevent Seller at Seller's option from resorting to this or any other available remedy in the case of subsequent default, or

C Seller may, upon written notice to Buyer, declare the entire principal balance and accrued interest hereunder at once due and payable and may elect to treat this contract as a note secured by a deed of trust, with Escrow Agent (hereafter named) as Trustee with power of sale thereunder and without requirement to tender legal title to Buyer, proceed immediately to foreclose in accordance with the laws of the State of Utah applicable to trust deeds

17 Escrow Simultaneously with the execution of this contract Seller shall execute a good and sufficient warranty deed conveying title to the Property to Buyer, and Buyer shall execute a good and sufficient quit claim deed to the Property in favor of Escrow Agent (hereafter named) as Trustee. Both deeds, together with a copy of this contract and such further instructions as shall be deemed necessary or convenient to carry out this contract, shall be deposited forthwith with ASSOCIATED TITLE COMPANY (a member of the Utah State Bar; a bank, building and loan association, savings and loan association or insurance company authorized to do such business in Utah; a corporation authorized to conduct a trust business in Utah; a title insurance or abstract company authorized to do such business in Utah; or a U.S. Government Agency) whose address is 833 E 400 So. St., Salt Lake City, Utah 84103 hereafter called "Escrow Agent") who shall hold said documents during Buyer's performance of this contract and shall deliver the same to Buyer upon completion of Buyer's obligation hereunder, or to Seller together with a Trustee's Deed in favor of Seller upon the expiration of thirty (30) days after Seller shall have notified Escrow Agent and Buyer, by sworn statement, at the above-given addresses by certified or registered mail that Buyer has defaulted and failed to cure such default, and Seller has elected the remedy in Section 16A, in accordance with the provisions of this contract. Costs of establishing and maintaining the escrow shall be borne equally

18 Assignment. In the event Buyer or any assignee of Buyer assigns this contract, Buyer or such assignee shall, at the time of said assignment, deposit with Escrow Agent a good and sufficient special warranty deed in favor of the assignee, and said deed shall be held and delivered by Escrow Agent along with and under the same conditions as the deeds deposited originally with Escrow Agent. In the event Seller assigns or transfers his interest in the Property to a third-party, at the time of such transfer, Seller shall deposit into escrow a special warranty deed from the third-party to Buyer

19 Time of Essence. It is expressly agreed that time is of the essence in this contract.

20 Warranties of Physical Condition. With respect to the physical condition of the Property Seller warrants the following: (1) That there are no leaks now existing in the basement due to surface or drainage waters.  
(2) That Seller will replace broken glass in basement windows.

21. Captions. Section captions shall not in any way limit, modify, or alter the provisions in the section.

22. Entire Agreement. This contract contains the entire agreement between the parties hereto. Any provisions hereof not enforceable under the laws of the State of Utah shall not affect the validity of any other provisions hereof.

23. Other Provisions. (1) Seller is given the option to secure and maintain loans secured by said property or not to exceed the then unpaid contract balance hereunder payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by the Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. (2) Seller agrees to lease the subject property from buyer for a period of up to August 31, 1984 at the rate \$800.00 per month. Seller to pay any increase in taxes and insurance during this lease period as an increase in the rent. (3) If buyer's home at 1626 Spring Run Drive sells and closes prior August 31, 1984, seller will vacate the subject property within 30 days on receipt of written notice.  
(See addendum attached hereto and by this reference made a part hereof

BOOK 5503 PAGE 2101

IN WITNESS WHEREOF, the parties have set their signatures on the day and year first above written.

BUYER:

[Signature]  
[Signature]

SELLER:

Geraldine Baker  
Geraldine Baker Nelson

STATE OF UTAH

ss.

COUNTY OF Salt Lake

On the 31st day of October, 1983, personally appeared before me Geraldine Baker  
aka. Geraldine Baker Nelson  
Seller and signer of the above instrument, who duly acknowledged to me that he executed the same.

My Commission Expires: 7-28-87

[Signature]  
NOTARY PUBLIC

Residing at: SLC Utah

STATE OF UTAH

ss.

COUNTY OF Salt Lake

On the 31st day of October, 1983, personally appeared before me Paul R. Lochhead  
Buyer and signer of the above instrument, who duly acknowledged to me that he executed the same and Penny Lochhead

My Commission Expires: 8-19-87

[Signature]  
NOTARY PUBLIC

Residing at: Salt Lake County, Utah

STATE OF UTAH

ss.

COUNTY OF \_\_\_\_\_

On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, personally appeared before me \_\_\_\_\_,  
who being by me duly sworn, did say that he is the \_\_\_\_\_ [title] of \_\_\_\_\_,  
a corporation of the State of \_\_\_\_\_ and Seller in the above instrument, and that the above instrument was signed in behalf of said  
corporation by authority of its bylaws/a resolution of its board of directors [strike where inapplicable] and said \_\_\_\_\_  
duly acknowledged to me that said corporation executed the same.

My Commission Expires: \_\_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC

Residing at: \_\_\_\_\_

STATE OF UTAH

ss.

COUNTY OF \_\_\_\_\_

On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, personally appeared before me \_\_\_\_\_,  
who being by me duly sworn, did say that he is the \_\_\_\_\_ [title] of \_\_\_\_\_,  
a corporation of the State of \_\_\_\_\_ and Buyer in the above instrument, and that the above instrument was signed in behalf of said  
corporation by authority of its bylaws/a resolution of its board of directors [strike where inapplicable] and said \_\_\_\_\_  
duly acknowledged to me that said corporation executed the same.

My Commission Expires: \_\_\_\_\_

\_\_\_\_\_  
NOTARY PUBLIC

Residing at: \_\_\_\_\_

BOOK 5503 PAGE 2102


PAUL R. LOCHHEAD and PENNY  
LOCHHEAD,  
  
Plaintiffs,  
  
vs.  
  
GERALDINE BAKER NELSON,  
  
Defendant.

)  
)  
) SPECIAL VERDICT  
)  
)  
) Civil No. C86-506  
)  
) Judge Kenneth Rigtrup  
)  
)

QUESTION NO. 1: Did the parties intend that the language of the contract apply to the water problems experienced by the Lochheads?

Yes

No



JURY  
Roll

	<u>1</u>	<u>2</u>
Madden	No	No
Woods	Yes	Yes
Davis	No	No
Haines	Abst.	No
West	No	No

		<u>1</u>	<u>2</u>
-1-	Mogley	No	No
	Johnson	No	No
	Cubeck	No	No



QUESTION NO. 2: Was there a breach of the contract  
or warranty by Mrs. Nelson?

Yes \_\_\_\_\_

No   ✓  

If you have answered yes to questions numbered 1 and  
2 answer question 3.

QUESTION NO. 3: What are the reasonable damages  
experienced by the Lochheads?

\$ \_\_\_\_\_

Dated and returned to court this \_\_\_\_\_ day of April,  
1988.

\_\_\_\_\_  
FOREMAN

FILED

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Paul R. Lochhead and Penny )  
Lochhead, )  
 )  
Plaintiffs and Respondents, )  
 )  
v. )  
 )  
Geraldine Baker Nelson, )  
 )  
Defendant and Appellant. )

ORDER

Case No. 880508-CA

Before Judges Davidson, Jackson and Orme (On Rule 31 Hearing).

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This matter is before the court pursuant to Rule 31, Rules of the Utah Court of Appeals.

IT IS HEREBY ORDERED THAT the judgment of the trial court denying an award of attorneys' fees to Geraldine Baker Nelson (Case No. 880508-CA) is affirmed, and

IT IS FURTHER ORDERED THAT the judgment of the trial court on Geraldine Baker Nelson's counterclaim for taxes (Case No. 880568-CA) is affirmed.

DATED this 13<sup>th</sup> day of April, 1989.

FOR THE COURT:

  
Richard C. Davidson, Judge

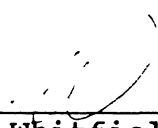
CERTIFICATE OF MAILING

I hereby certify that on the 13th day of April, 1989, a true and correct copy of the foregoing Order was mailed to each of the following:

Steven F. Alder  
Cheryl M. Brower  
Attorneys at Law  
220 East 3900 South #16  
Salt Lake City, UT 84107

Robert H. Wilde  
Attorney at Law  
6925 Union Park Center, Suite 490  
Midvale, UT 84047

Hon. Kenneth Rigtrup  
Third District Court  
Salt Lake County  
#C86-506



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Julia C. Whitfield  
Case Management Clerk